No. 3426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

BRIEF FOR CROSS-APPELLEES.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Cross-Appellees.

PERNAU-WALSH PRINTING CO.

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BRIEF FOR CROSS-APPELLEES.

Libelant (cross-appellant) claimed demurrage for the period from August 25, 1917, to October 14, 1917.

The lower court refused to allow this claim in its decree (448), and libelant appeals from this part of the decree (459).

The Facts.

(1) The charter-party provided that the vessel, when built, "shall proceed direct in ballast to a loading place on Puget Sound, *to be designated by charterers* * * *". On July 2, 1917, respondents designated "Crown Lumber Mill Company, Mukilteo, and the Puget Sound Mills and Timber Company, Port Angeles", as the loading mills (31).

(2) The charter-party did not name a definite time at which the laydays should commence, or within which the loading should be completed.

(3) Libelant's claim is based upon the following allegation in the libel:

> "That upon the 25th day of August, 1917, said vessel being then in all respects ready to receive and commence loading her said cargo, said libelant notified said respondents of such fact, and asked said respondents to designate the mill or loading port at which said cargo was to be loaded * * *" (5).

(4) The notice so referred to in the libel, and upon which libelant relies as a basis for this claim, was a telegram sent by him to respondents, on *August 13, 1917,* reciting that "Schooner Levi W. Ostrander will be ready for cargo by August 25th" (271-272). On the date of this notice the schooner was in cross-appellant's yards, still in course of construction.

(5) There is no evidence in the record to support the allegation that "upon the 25th day of August, 1917, said libelant notified said respondents" of the fact alleged in the libel, or of any fact whatever; nor did

libelant in fact give any notice whatever to respondents on August 25.

(6) On *August 16, 1917,* respondents wrote to libelant:

> "If the vessel insists on going to the mill, she may go to Port Angeles" (33).

(7) The vessel did not insist on going to the loading place, but chose to remain at Seaborn Yards (100 miles from loading place) until October 13, 1917.

(8) The evidence shows that, on August 13, when the notice was given, the vessel was *not* in all respects ready to receive and commence loading any cargo. Admittedly work was done on her between August 25 and October 14.

(9) However that may be, the evidence shows conclusively that, on August 13, and on August 25, and at all times down to October 15, the vessel was not ready to receive and commence loading *"her said cargo",* viz.: the cargo which she had agreed to load, being a cargo of lumber at Port Angeles. To receive and load such a cargo, it was necessary for her to first perform her first duty to respondents under the charter-party, viz.: to *"proceed direct in ballast"* to the designated loading place at Port Angeles. She did not so proceed until October 14.

(10) The charter-party clause relied upon by libelant in support of his claim for demurrage provides for payment of $250 per day—not for every detention of the vessel, but only for "detention *by default of said party of the second part"* (Charterer) (13).

We reserve the contention made in our appeal that this provision, under the charter, applies only to the discharge of the vessel; but assuming that it applies to detention at the port of loading, cross-appellant must show, in order to support his claim, that the vessel was detained at the loading port, between August 25 and October 13, by default of cross-appellees.

THE FACTS ARE THAT SHE WAS NOT, IN FACT, AT THE LOADING PORT AT ANY TIME WITHIN THIS PERIOD; THAT, CONSEQUENTLY, SHE WAS NOT DETAINED THERE. THE FACTS ALSO SHOW THAT SHE WAS NOT DETAINED AT SEABORN YARDS, WHERE SHE WAS BUILT, BY CHARTERERS OR ANY ONE FOR WHOM THE CHARTERERS WERE RESPONSIBLE.

A. *The vessel was not in fact ready to receive and commence loading her cargo at any time within the period for which demurrage is claimed.*

B. *The notice of August 13th did not make charterers responsible for demurrage.*

C. *There was no "detention by default of" respondents.*

The Law and Argument.

A. When, on July 2nd, charterers wrote to the owner: "We will load her at the Crown Lumber Company, Mukilteo, and the Puget Sound Mills & Timber Company, Port Angeles", and when thereafter, on August 16th, the charterers wrote to the owner: "She may go to Port Angeles", the legal effect was the same as if the mill of the Puget Sound Mills & Timber Com-

pany, at Port Angeles, had been originally inserted in the charter-party as the agreed loading place.

Aktieselskabet Inglewood v. Millar, 9 Asp. 411.

The first charter-duty, after the vessel was built, was the duty imposed upon the owner, that "the vessel shall proceed direct in ballast to a loading place on Puget Sound, to be designated by charterers". After the designations made on July 2nd and August 16th, the initial duty, upon which all the other obligations of the charter-party were conditioned, was the duty of the vessel to proceed to the mill of the Puget Sound Mills & Timber Company at Port Angeles.

During the entire period for which now demurrage is claimed the vessel remained in her owner's shipyard, where she was built, 100 miles from the agreed loading place.

The first charter-duty imposed upon the *charterer* was the duty *"to furnish to said vessel, at designated loading place",* a full cargo. Obviously the charterers' duties did not, and could not, begin until after the vessel was at the designated loading place. The owner's duty to have the vessel at the agreed loading place was a *condition precedent* to be fulfilled by the owner before he was entitled to call upon the charterers to perform their charter-duties, and particularly before he could make any plausible claim that time was beginning to run against the charterers so as to charge the latter with laydays and embryo demurrage.

The principles are stated, in classical form, by the Earl of Halsbury, in "The Laws of England", volume 26, beginning on page 177:

Sec. 268: "Where the ship in which the goods are to be carried is employed under a charter-party, certain *conditions* must be fulfilled by the shipowner *before* he is entitled to call upon the charterer to ship his goods. *The ship must be at the place of loading contemplated by the charter-party;* she must be ready to receive the goods on board, and notice of readiness must have been given to the charterer."

Sec. 269: "If the ship is not already lying in the port of loading at the time when the charter-party is made, she must proceed thither."

Sec. 271: "The shipowner is not discharged from his *duty to proceed to the port of loading* by reason of the fact that it has already become impossible for the ship to arrive there by the due date; nor can he call upon the charterer to extend the time or otherwise to indicate the intention of accepting or refusing the ship."

Sec. 272: "The ship must reach the port of loading specified in the charter-party * * *. If the port of loading is not specified in the charter-party, but is left to be named by the charterer, the effect of naming it is the same as if it had been specified in the charter-party * * *."

Sec. 273: "*For the purpose of demurrage and damages for detention time begins to run against the charterer from the arrival of the ship at her port of loading* * * *."

Sec. 210: "Time does not begin to run against the charterer until the ship has been placed at his disposal. *She is not at his disposal until she has reached the place named in the charter-party as the place where she is to take in her cargo* * * * *and until she is ready to do so.*"

No one doubts now that these are correct statements of the law of England, and the United States.

In *Anderson v. Moore,* 179 Fed. 68, this court says approvingly:

> "In Hutchinson on American Law of Carriers, sec. 848, it is said: 'Laydays at the port of loading do not begin to run against the charterer until the master gives notice to the charterer that his vessel is ready to receive cargo.' Such a notice can properly be given only after the ship is *ready and at her proper place for loading.* And the same authority says that the *charterers will not be liable* 'for a delay occasioned by the ship being unable to proceed to the designated berth, owing to the crowded condition of the dock'."

See also

> *W. K. Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 408.

In the article on "*Shipping*", 36 Cyc. 364, the rule is stated in these words:

> "In the absence of anything in the contract indicating a contrary intention the laydays do not begin to run until the vessel is in her berth * * * and where it is provided that the vessel shall proceed to a certain specified wharf * * * or one to be selected by the charterer, *the arrival of the ship at that wharf * * * is a condition precedent to the commencement of the running of the time* unless she is prevented from reaching the designated place through the active fault of the charterer, in which case the days begin to count at the time she would have reached it but for such fault."

It is not, nor could it be, claimed that either the charterers or the loading mill prevented the schooner from proceeding from the owner's shipyard to the wharf of the designated loading mill. The evidence

shows that, on August 16th, the owner was invited to send his vessel to the loading mill at Port Angeles.

The ruling principles are, indeed, admitted by the argument. Counsel says:

> "The general rule is, no doubt, that if a loading place is definitely named in the charter-party, or if the charter-party gives the charterer a right to designate a loading place, then the vessel must proceed to the place either named in the charter-party or designated by the charterer, before her laydays commence to count" (Opening Brief, p. 25).

The words cited by counsel from Halsbury's Law of England, sec. 273, are applicable:

> "In this case the ship is *not an arrived ship, and the charterer's obligation to provide a cargo does not arise until she has actually reached the precise spot specified in the charter-party*" (Opening Brief, p. 26).

The learned proctor for cross-appellant also reviews certain authorities (Opening Brief, pp. 27-32), anticipating that they should be cited on behalf of cross-appellees, which support the statements of the law made in Halsbury's work and in Cyc., above referred to. All of these erect insuperable obstacles in cross-appellant's path; but as the principles involved are elementary, and thoroughly familiar, we would consider it a waste of the valuable time of this court, and almost a reflection upon its learning, to extend this part of the argument.

To overcome the difficulties which the law has thus interposed to cross-appellant's claim, his proctor re-

lies up the contention that the charterers did not name a loading place until October 12th. The facts are, however, that, twice before the owner's so-called "readiness", on August 25th, the loading place was named: first on July 2nd, and again on August 16th. On July 2nd charterers wrote:

> "With your permission we will load her at the Crown Lumber Company, Mukilteo, and the Puget Sound Mills & Timber Company, Port Angeles."

On August 16th charterers, after referring to existing labor troubles, stated:

> "If the vessel insists on going to the mill, she may go to Port Angeles",

and again:

> "It might be well for you to keep in touch with Puget Sound Mills & Timber Company, Port Angeles, regarding the loading of the Levi W. Ostrander" (33, 34).

On October 12th, the charterers wired to the owner:

> "Owing to the supply of logs and the general ability of the Port Angeles Mills & Timber Company, Port Angeles, Washington, to manufacture with dispatch the cargo for the Levi W. Ostrander would now advise *in case you have not acted on our previous instructions that this vessel be ordered to the Port Angeles mill* when she is ready to load cargo. We are informed that work is still being done completing this vessel. Will you kindly telegraph us if this is correct, and if so when this vessel will be ready to receive lumber at Port Angeles" (43).

It is argued that this designation of the loading place is in some way impaired by the fact that charterers add-

ed to the words "she may go to Port Angeles" the words: "but her laydays cannot commence to count until the mill is able to take care of her, this on account of the general strike".

It is admitted that "the charterers in this case *had the option of ordering the vessel to go to Port Angeles*" (Cross-Appellant's Brief, p. 37). The addition of the words referring to the commencement of the laydays was *not,* as counsel suggests, an attempt to impose a "further option" upon the shipowner; it was the expression of an opinion, on a question of law, with which the owner was at liberty to disagree. It did not prevent him from sending his vessel to Port Angeles. It takes two parties to make an agreement; had the owner said nothing in response to the charterers' assertion, this assertion would not have been binding upon the owner; but if the owner considered it necessary to record a clear dissent from the charterers' views, he could have sent his vessel to Port Angeles, accompanying this act with a declaration that, contrary to charterers' assertion, laydays did commence to count and that no demurrage was waived.

The correspondence and the facts show that charterers were at all times willing that the vessel should proceed to the loading place when ready; that the circumstances created by the great strike made it impossible for the mill to deliver the cargo "to vessel at loading port as fast as vessel can receive it" (clause T of charter-party, Ap. p. 14), but that charterers suggested repeatedly "that the vessel would save time if, instead of waiting at Seaborn Yard after ready to load, she pro-

ceeded to the loading wharf * * * and there accepted the cargo *as fast as the mill will deliver it.* We are assured by the mill that it will use its best efforts to give you all possible despatch in the delivery of the cargo'' (Cross-Appellant's Brief 40).

Reliance is also placed by cross-appellant upon the assertion that ''it was at all times said that the vessel would be compelled to load at two ports, the first one of which was *Mukilteo''* (Cross-Appellant's Brief 41). Assuming this to be true, it would not aid the position of cross-appellant; for he never sent his vessel to Mukilteo, and she never left her birthplace within the period for which demurrage is claimed. On July 2nd the charterer had named two loading ports ''on a direct line to sea''. If the owner intended, or was ready, to set the laydays running, he could send his vessel to either of these ports. The case of *Mobile & Gulf Nav. Co. v. Sugar Products Co.,* 256 Fed. 392 (Brief p. 43), is not in point; for there the charterer did *not* inform the vessel of the loading port promptly, whereas here the vessel, if she had really been ready before October 13, ''*could* have proceeded without delay''. The same answer applies to the case of *The Silverstream* (Brief pp. 43, 44), as a reading of counsel's reference shows. The Scotch case, and the case in Lowell, discussed on pages 45-46 of the brief, is not a parallel case in any particular, as appears sufficiently from counsel's statement.

B. The owner's so-called ''notice of readiness'' was insufficient to start the laydays running. It was

given on August 13th and did not recite the fact that the vessel was then even ready to proceed to the loading place; it was a prediction that she would be ready to do so twelve days later. Impliedly it was a denial that she was ready to proceed to the loading place on the day when the notice was given. The record shows that important and necessary additions were made on the vessel after August 25th, and during the month of September and the first week of October (44, 129-132, 154). The windlass was admittedly not tested out on August 25th (133); when it was tested later the wild cat broke, and had to be renewed (159). The vessel was not seaworthy on August 25th; the notice of readiness would, therefore, not have been a true notice even if it had been given on August 25th. Apart from the fact that, on August 25th, she was 100 miles from the designated loading place, and voluntarily remained there until October 14th without any default of charterer, the notice of "readiness" would not have been a true notice even if she had then been at Port Angeles instead of Tacoma.

C. The vessel *was not detained at Tacoma by default of the charterers or their agents.* She remained in cross-appellant's own shipyard, under his exclusive control and in his exclusive possession. If she was a finished ship and ready to proceed on August 25th, she could have "proceeded direct in ballast to her loading port" at Port Angeles or Mukilteo and set the laydays running against the charterers by giving the proper notice at the loading port.

To "detain" is defined as "to hold back or restrain from proceeding"; "detention" is defined as "the act of detaining, confining or restraining" (New Standard Dictionary).

Far from holding the vessel back or restraining her from proceeding to the loading port, the charterers had invited her to proceed. The fact that the charterers joined with the invitation a reservation of what they conceived to be their legal rights did not constitute a restraint or detention. The wrongful "detention" upon which the owner's right to demurrage is predicated presupposes a delivery of the vessel to the charterers, and refers to a period of time subsequent to delivery to the chaterers. The charter-party clause cannot be applied to a period prior to such delivery.

ALLEGED WAIVER OF THE CONDITION PRECEDENT.

On pages 47-57 of his Brief, cross-appellant argues that, granting that he had committed a breach of a condition precedent (to proceed to the loading port), yet Hind, Rolph & Co. had *waived* the breach of this condition precedent. The argument is stated as follows:

> "Now in the case at bar Hind, Rolph & Company *certainly knew* that the 'Ostrander' did not go to Port Angeles on August 25th. They therefore waived the condition precedent" (Brief p. 51).

This seems to be the novel doctrine: If the first party to a contract knows that the second party has committed a breach of a condition precedent, the first

party thereby waives the performance of the condition precedent.

The mere statement of the doctrine is a sufficient refutation thereof. It is hardly necessary to say that the English case cited *(Bentsen v. Taylor,* Brief p. 47) does not lay down such a doctrine and that, if it did, this court would not follow it as an authority.

THE FUNDAMENTAL PRINCIPLES GOVERNING BOTH APPEALS.

Since the filing of Appellant's Opening Brief we have received the report of a case which went through the County Court, the Divisional Court, the Court of Appeal and the House of Lords of England and was finally decided in December, 1919. This case is the latest expression of the principles of law ruling the case at bar. The facts are strikingly similar; the fact that the delay occurred, in the English case, in connection with the discharge, while in the case at bar it occurred in connection with the loading, is immaterial.

The case referred to is **"The Lizzie"** *(Van Lieven v. Hollis Bros.,* 25 Com. Cas. 83 (House of Lords)).

The charter provided:

> (1) "the cargo to be loaded and discharged * * * as fast as the steamer can receive and deliver".
>
> (2) "should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at £25 per day."

A custom of the port was proved that it was the duty of the receivers of the cargo to have clear wharf space ready.

Owing to the congested state of the port when the vessel arrived, the discharge was not completed until eighteen days after the vessel's arrival, although it could have been completed in seven days, had there been clear wharf space and had the discharge proceeded at the vessel's maximum rate.

The owner brought an action for eleven days' demurrage.

Held: The words of the charter-party, and the proved custom of the port do *not* impose on the charterers an absolute and unqualified obligation to discharge the steamer in any fixed number of days; and as the charterers had done all that they reasonably could to discharge the steamer, and the delay which had taken place had been wholly due to circumstances over which the charterers had no control, the action failed.

The case was discussed, in the Court of Appeal, "subject to the question whether the 'Lizzie' was an '*arrived ship*' before October 6, when she was first in a position to discharge some of her cargo".

Thus, in the case at bar, the first question was:

"When was the 'Ostrander' an 'arrived ship', or first in a position to load some of her cargo?"

In the House of Lords Viscount Haldane said:

> "In such a case the liability of the charterer is treated as being only an obligation to take delivery with the utmost dispatch practicable, excluding affection by circumstances not under the control of the charterer. If a liability not qualified in this fashion is to be imposed, the language imposed must be definite on the point and free from ambiguity."

This judge, as well as the others, relied upon the previously decided House of Lord's case of *Hulthen v. Stewart* (1903), 9 Asp. 403. In that case it was agreed by the charter-party that the charterer should discharge the vessel's cargo "with customary steamship dispatch, *as fast as the steamer can deliver*"; but delivery was delayed by the crowded state of the dock. In discussing this case, Lord Dunedin said, in *"The Lizzie"*, 25 Com. Cas., p. 88:

> "The argument put forward, that the normal period of discharge could be expressed in terms of days and *then* constituted an absolute obligation, was rejected, it having been found as a fact that the charterers had done all that they reasonably could to discharge the vessel * * * The general proposition was laid down by Lord Macnaghten as follows: 'It is, I think, established that *in order to make a charterer unconditionally liable it is not enough to stipulate that the cargo is to be discharged 'with all dispatch', or 'as fast as the steamer can deliver', or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished.*"

Finally Lord Atkinson expresses the same principle in the following words (p. 91):

> "If, by the terms of the charter-party, the charterers have agreed to discharge the chartered ship within a *fixed* period of time, that is an absolute and unconditional engagement for the non-performance of which they are answerable, whatever be the nature of the impediments which prevent them from performing it, and thereby cause the ship to be

detained in their service beyond the time stipulated."

"If no time be fixed expressly or impliedly by the charter-party, the law implies an agreement by the charterer *to discharge the cargo within a reasonable time, having regard to all the circumstances of the case as they actually exist,* including the custom or practice of the port, the facilities available thereat, and any impediments arising therefrom which the charterer could not have overcome by reasonable diligence."

In the instant case Judge Neterer found that,

(1) "The vessel was ready to receive cargo on October 15th * * *

(2) "It was the duty of respondents to furnish cargo *as fast as it could be loaded.* * * * "

(3) "Had cargo been furnished, the vessel *could have been loaded* by October 31st. * * * "

(4) "Libelant is entitled to demurrage from October 31st."

The judge, therefore, held the clause in the charter-party requiring the charterers to deliver cargo "as fast as it could be loaded" to be a clause imposing an *absolute duty,* for the non-performance of which charterers are made answerable, instead of holding, under the authorities, that the clause imposes merely a duty to furnish cargo within a reasonable time, having regard to all the circumstances.

The court, in deciding that no demurrage is due to the vessel for the period covered by the cross-appeal was clearly right.

The cross-appeal should be dismissed, with costs to cross-appellees.

Dated, San Francisco,
May 5, 1920.

Respectfully submitted,
ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Cross-Appellees.